Supreme Court, U. S.
FILED
JAN 6 1981
MICHAEL RODAK, JR., CLERK

No. 80-302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EDWARD ANDREW KIMPEL, III,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Third District

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

FREDERICK F. COHN
CAROLINE JAFFE
35 East Wacker Drive
Chicago, Illinois 60601
(312) 641-0692
Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

TABLE OF CONTENTS

PAGE

JURISDICTIONAL STATEMENT 1

ARGUMENT:

Introduction 3

1.

An indigent's right to counsel on appeal is not fulfilled—and the spirit, if not the letter, of the law as stated in the constitutional mandate issued by this Court in *Anders v. California*, 386 U.S. 738, is violated—where appointed appellate counsel simply files an inept Brief merely attacking the propriety of the sentence, without either filing an "*Anders*" Brief or raising any issues regarding the sufficiency of the evidence to support the conviction for murder or the fairness of the procedures resulting in conviction. 3

2.

Petitioner was deprived of due process of law at his sentencing hearing, where the trial court considered psychological reports 18 to 21 years old, absent any indication of the qualifications or expertise of their preparers, and despite petitioner's arguments to the sentencing court that the reports were inaccurate and hearsay, that they were too ancient to be relevant, and that they contained privileged material. 6

CONCLUSION 7

APPENDIX A—Affidavit of Frederick F. Cohn ... 9

TABLE OF AUTHORITIES

Cases

Anders v. California, 386 U.S. 738 ..... *passim*

U.S. ex rel. Williams v. Brantley, 502 F.2d 1383 (7th Cir. 1974). 2

In The

Supreme Court of the United States

October Term, 1980

EDWARD ANDREW KIMPEL, III,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Third District

---

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTIONAL STATEMENT

While conceding that the jurisdictional prerequisites are adequately set forth in the petition as to the second question,[1] respondent takes the position that as to the first question,[2] this Court lacks certiorari jurisdiction

---

[1] *Re* fairness of sentencing hearing.

[2] *Re* appellate counsel's performance.

because there exists, in Illinois, a statutory post-conviction remedy whereby counsel's appellate performance can collaterally be attacked. (R. Br. 1-2)

The mere existence of a means of collateral review, the efficacy of which has judicially been questioned,[3] must not defeat certiorari jurisdiction, particularly where, as here, the State concedes jurisdiction as to the other issue. The *Anders* question—posing, as it does, an issue which should uniformly be answered on a national level and thus should be decided by this Court per its own guidelines—should be decided as speedily as possible.

[3] See *U.S. ex rel. Williams v. Brantley*, 502 F.2d 1383 (7th Cir. 1974).

ARGUMENT

Introduction

Respondent asserts that "an extension of *Anders* in this case defies both the letter and spirit of that opinion and would not be in the best interest of indigent defendants; . . ." (R. Br. 4), and that the competency issue "revolves around facts peculiar to the case at hand and would not involve issues germane to any future litigants; . . . " (R. Br. 4) As to the sentencing issue, the State's position is that "the trial court's consideration of the questioned material at the sentencing hearing was proper or, if not, the material was not so inherently unreliable as to undermine the fairness of petitioner's sentencing hearing." (R. Br. 4) Petitioner will reply seriatim.

1.

An indigent's right to counsel on appeal is not fulfilled—and the spirit, if not the letter, of the law as stated in the constitutional mandate issued by this Court in *Anders v. California*, 386 U.S. 738, is violated—where appointed appellate counsel simply files an inept Brief merely attacking the propriety of the sentence, without either filing an "*Anders*" Brief or raising any issues regarding the sufficiency of the evidence to support the conviction for murder or the fairness of the procedures resulting in conviction.

The State concedes:

> "This Court has consistently interpreted that right [to effective assistance of counsel] to require that an indigent defendant enjoy substantially the same kind of appeal as one who can afford to retain an attorney of his choice." (R. Br. 4-5)

When was the last time you came across an appeal in a murder case where privately retained counsel urged only sentencing issues?

Of course, *Anders* "makes no distinction between sentencing issues and issues challenging the conviction." (R. Br. 5) A court can and does decide only those questions which are in fact before it. There was no conviction-sentencing dichotomy at issue in *Anders*, so, naturally, no such distinction is made therein. What we ask this Court to do is to extend the *Anders* rationale to the instant situation, thereby assuring that no appointed counsel may ever again circumvent his *Anders* obligation merely by writing an appeal attacking only the sentence.

In the "best of all possible worlds,"[4] perhaps, courts could "insure that only competent and responsible attorneys that are responsive to the needs of their clients are appointed." (R. Br. 7) But we are here and now, in a world where this Court has deemed *Anders* necessary. In such a world, the bulk of indigents on appeal are represented by defender offices, not by individual attorneys of the James Stewart type[5] selectively chosen by the courts. And the ratio between manhours available and amount of work which must be accomplished by such an office simply poses too great a temptation to "cut corners" in a manner which does not occur to retained counsel. The only way, we submit, to insure that the indigent defendant and the well-heeled defendant receive comparable representation on appeal, is to hold that *Anders* will not permit what was done at bar.

---

[4] From Leonard Bernstein's musical version of Voltaire's *Candide*.

[5] *I.e.*, the country attorney role in the movie version of Agatha Christie's "Witness for the Prosecution."

Respondent suggests that because retained counsel do not clutter their briefs with marginal issues, requiring appointed counsel to include all arguable issues in cases where counsel does not seek to withdraw would operate to the tactical disadvantage of indigent defendants on appeal. (R. Br. 6) That is not the result we request or seek. On the contrary, we urge that where appointed counsel intends to file a brief attacking sentencing procedures only, the Court require that an *Anders*-type letter and Brief be filed as to the arguable issues respecting the conviction. We do not urge, as respondent seems to think, that all such arguable issues actually be included in the Brief to be filed for the reviewing court's consideration. We submit that the procedural aspects can easily be ironed out so that appellate tactics will not perpetuate the schism between the rich and the poor in our courts of law.

Respondent urges on the one hand that the uniqueness of the facts renders the grant of certiorari improvident, (R. 4), while at the same time stating, without reference to any authority or source for the information, that "The Illinois Appellate Defender's Office, which Mr. Gottfried heads, waives oral argument in almost half of its cases."[6] (R. Br. 8) Even if waiver of oral argument and the decision not to file a reply brief may be "strategy decisions commonly utilized by the criminal bar," (R. Br. 8), then the point of reference should be the retained, not the appointed, bar, to enforce the uniformity of representation assured to all litigants.

[6] We hereby challenge respondent's inclusion of this so-called "fact" in its Brief in Opposition, as it goes to a matter outside the record, without any reference to the source of the information. Indeed, attached is counsel's Affidavit (App. A, attached hereto) stating that Mr. Gottfried told him that the asserted facts therein stated are not true, and that he never advised anyone that his office waives argument and chooses not to file a reply brief in almost half its cases.

By referring to wholesale waivers by the appointed bar, respondent points up the non-uniqueness of the case at bar. While we do not have any actual figures on hand, we are willing to wager that many indigent appellants wind up attacking only the sentence, while few rich ones so limit their appeals.[7]

2.

Petitioner was deprived of due process of law at his sentencing hearing, where the trial court considered psychological reports 18 to 21 years old, absent any indication of the qualifications or expertise of their preparers, and despite petitioner's arguments to the sentencing court that the reports were inaccurate and hearsay, that they were too ancient to be relevant, and that they contained privileged material.

Petitioner relies on his petition.

[7] Respondent also suggests that, absent an allegation that petitioner wanted or asked his appointed counsel to raise any issues pertaining to the conviction, no viable issue is presented by counsel's failure so to do. (R. Br. 6) The indigent defendant cannot be expected to "run his own case." Considering the volume of indigent appeals which must be handled by the various appointed defender offices, to impose any such requirement would all but emasculate both *Anders* and the Sixth Amendment, the purposes of which *Anders* was, we believed, meant to effectuate.

CONCLUSION

For the reasons stated in the Petition, as amplified by this Reply, certiorari should be granted.

Respectfully submitted,

FREDERICK F. COHN
CAROLINE JAFFE
35 East Wacker Drive
Chicago, Illinois 60601
(312) 641-0692
Attorneys for Petitioner

APPENDIX A

AFFIDAVIT

I, Frederick F. Cohn, being first duly sworn, on oath deposes and states:

1. I have been advised by Mr. Gottfried that the facts stated within the government's Brief in Opposition to Petition for Certiorari are not true and that he never advised anyone that his office waives argument and chooses not to file a Reply Brief in almost half of its cases.

/s/ FREDERICK F. COHN

Subscribed and sworn to
before me this 3rd day
of January, 1981.

_____

Notary Public

PREVIOUS PAGE WAS BLANK